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IN THE

Supreme Court of the United States

October Term 1980

No. 80-1765

THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,

Petitioner,

v.

HYDROLEVEL CORPORATION,

Respondent.

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION OF ENGINEERING SOCIETIES IN SUPPORT OF THE PETITIONER, THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS

MICHAEL D. BROWN
Attorney for The American Association of Engineering Societies, Inc.
1370 Avenue of the Americas
New York, New York 10019
(212) 489-0220

Of Counsel:
HOWARD B. PRESANT
STEIN SIMPSON ROSEN & OHRENSTEIN
1370 Avenue of the Americas
New York, New York 10019

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Preliminary Statement

The American Association of Engineering Societies, Inc. ("AAES") is a non-profit membership corporation organized solely for scientific, educational and charitable activities in the public interest. As an association enjoying tax exempt status under §501(c)(3) of the Internal Revenue Code, the sole function of AAES is to serve the public by helping to develop an understanding of the technological considerations which have increasingly become part of various public policy decisions. By galvanizing the diverse expertise of its more than 38 member societies representing approximately 850,000 engineers, AAES has come to play an increasingly active role in discharging the responsibilities of engineers to advise the public and elected officials on technology and related issues of the day.

For more than forty (40) years, AAES*, its predecessor organizations, and its constituant societies have fulfilled their public interest work at no cost to the public through the "exploitation" of the talents of thousands of dedicated volunteers. Now, due to the decision of the United States Court of Appeals for the Second Circuit in *Hydrolevel Corporation* v. *The American Society of Mechanical Engineers,*** the ability of AAES, its member societies and other non-profit membership corporations to offer these increasingly important services to the public has been called into question.

While Petitioner, the American Society of Mechanical Engineers ("ASME"), has a direct pecuniary interest in the outcome of the *Hydrolevel* case, AAES and the other non-profit societies that make up its membership have a transcending interest in this Court's review of the decision below—the ability of non-profit membership corporations to continue to utilize the services of volunteers to perform their public interest work.

Statement of the Case

The narrow question presented by the instant case is whether, or to what extent, ASME may be held liable for treble damages under the antitrust laws for the improper and wholly unauthorized acts of two volunteers who, totally unbeknownst to ASME but using ASME procedures, sought to benefit their own commercial employers at the expense of a competitor. In deciding that a non-profit membership

*In December, 1979, the Engineer's Joint Council ("EJC") changed its name to AAES. EJC had previously been serving the public for more than forty (40) years and enjoyed tax exempt status since 1961.

**Dkt. Nos. 79-7254 and 79-7260, decided November 24, 1980.

corporation may be held liable for treble damages for the acts of disloyal volunteers who acted without authority and against their principal's interests, the lower court has, in our judgment, promulgated a sweeping rule of law that is not only at odds with prior decisions of this Court and other courts of appeal, but is entirely inconsistent with the long established public policy of encouraging the efforts of non-profit associations serving the public interest through the work of volunteers. Accordingly, this *amicus curiae* brief is submitted solely to address this important issue of public policy.

The Facts and Questions Presented

The facts of this case and the questions presented have been presented at length in ASME's Brief and are adopted for the purposes of this brief.

Summary of Argument

Simply stated, the decision below, if left to stand, will have a profound chilling effect on many, if not all, non-profit membership corporations which, of necessity, rely in good faith upon the work of their many volunteers. By ruling that a non-profit membership corporation may, under certain unspecified circumstances, be held vicariously liable for the unauthorized acts of its volunteer-agents, even where the acts at issue are taken without prior knowledge or approval and where they are not taken to advance the interests of the membership corporation, the Court of Appeals has ignored precedent, run afoul of long established public policy and created a "sword of Damocles" (the spector of treble damage liability) which is so threat-

ening that many such public service organizations may simply not be able to afford the risk of continuing to utilize the services of volunteers and will, therefore, have to discontinue rendering invaluable services to the public.

POINT ONE

The Decision Below creates a Rule of Law that is against long established public policy and will have a disastrous effect on Non-Profit, Voluntary Membership Organizations.

While holding that a non-profit membership corporation may be held liable under the antitrust laws for acts of volunteers which are neither authorized, intended to benefit the organization or even consistent with the corporation's purposes, the Court of Appeals has, in effect, made these public interest corporations "insurers" of the good faith of their volunteers. Since these non-profit organizations must rely primarily on the work of volunteers, this ruling, which is not only inconsistent with prior decisions of this Court and of other courts of appeal, if left to stand, will do nothing less than require non-profit corporations such as AES and the nearly 850,000* engineers represented

*The 850,000 engineers are represented by some 38 member societies drawn from the broad spectrum of the various engineering disciplines. These societies include: The American Society of Civil Engineers; The American Institute of Mining, Metallurgical & Petroleum Engineers, Inc.; The American Society of Mechanical Engineers; The Institute of Electrical & Electronic Engineers; The American Society for Engineering Education; The American Society of Heating, Refrigerating & Air-Conditioning Engineers, Inc.; The American Society of Agricultural Engineers; The American Institute of Chemical Engineers; The American Society for Metals; The National Council of Engineering Examiners; The Society of Manufacturing Engineers; The National Society of Professional Engineers; The National Institute of Ceramic Engineers; The Society of Allied Weight Engineers, Inc.; The

by its member societies to cut back on the broad spectrum of services they have traditionally provided to our society. Clearly, this decision extending the doctrine of vicarious liability holds for our society potentially serious adverse consequences and should not be left to stand.

As stated, the decision by the Second Circuit has broken new ground in expanding the concept of vicarious liability under the antitrust laws. However, by imposing liability on corporate principals for the acts done by an agent under his "apparent authority" the lower court has disregarded the basic principle long ago enunciated by this Court that participation in a conspiracy requires, at the least, a "unity of purpose or a common design and understanding, or a meeting of minds in an unlawful agreement." *American Tobacco Co.* v. *United States*, 328 U.S. 781, 810 (1946). While corporations have long been held "responsible for the wrongs committed by its agents in the course of its business", this Court has required that before a corporation may be held liable for the acts of its agents". . . it must be shown that (the act complained of) is in the business of the corporation." *United Mine Workers of America* v. *Coronado Coal Co.* 259 U.S. 344, 395 (1922).

Society of Plastics Engineers, Inc.; The American Society for Quality Control; The Standards Engineering Society; The American Institute of Industrial Engineers, Inc.; The Society of Women Engineers; The Society of Fire Protection Engineers; The American Institute of Plant Engineers; The American Nuclear Society; The American Academy of Environmental Engineers; The American Association of Cost Engineers; The System Safety Society; The Association of Energy Engineers; The American Indian Science & Engineering Society; The Air Pollution Control Association; The American Congress on Surveying & Mapping; The National Association of Corrosion Engineers; The Federation of Materials Societies; The Western Society of Engineers; The Cleveland Engineering Society; The Engineering Society of Detroit; The Washington Society of Engineers; The Colorado Society of Engineers; The Colorado Engineering Council; and The Engineering Societies of New England, Inc.

Indeed in applying the ruling of *Coronado Coal* and explaining the rationale for holding a corporation criminally liable for the acts of its agents, the Ninth Circuit Court of Appeals has noted that antitrust violations are usually motivated by a desire to enhance profits; commonly involve large, complex, and highly decentralized corporate business enterprises; and more often than not, involve the implementation, over an extended period of time, of basic policy decisions. *United States* v. *Hilton Hotels Corp.*, 467 F.2d 1000, 1006 (9th Cir. 1972), *cert. den.* 409 U.S. 1125 (1973).

By extending the rule of vicarious liability to cover acts done by agents under "apparent authority", the Court of Appeals has not only run afoul of the decision by this Court in *Coronado Coal supra*, but has imposed treble damage antitrust liability on a corporation whose policies are not only *not* profit oriented but whose very existence as a tax exempt "501(c)(3)" membership corporation rests upon its performance of scientific, educational and charitable services *in the public interest*. In sharp contrast to the decision in *Hilton Hotels, supra*, where the Ninth Circuit recognized that vicarious liability of a corporation was justified by the fact that antitrust violations are usually the result of the implementation of basic policy decisions, the acts here involved were not the result of basic policy decisions, but were, in fact, the result of a total and unauthorized perversion of the basic policies of the corporate principal.*

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*Indeed in holding the Hilton Hotel Corporation liable for the act of its agent, the Ninth Circut specifically noted that:

> "A purpose to benefit the corporation is necessary to bring the agent's acts within the scope of his employment." *Standard Oil Co.* v. *United States*, 307 F.2d 120, 128-129 (5th Cir. 1962)

In the instant case, it is conceded that the conspirators had no intention of benefitting ASME.

The case for restricting the imposition of corporate liability for those acts of agents which are either expressly authorized or at least taken to advance the purposes of the corporate principal is clear with regard to the instant matter. ASME, AAES and other non-profit membership corporations must by reason of their charters and tax exempt status limit their activities to scientific, educational and charitable functions. While the very nature of these restrictions compels these organizations to rely on the work of volunteers, it has also allowed them to perform important public services at no cost to the public. For example, the very code which is at the heart of the instant case has been established through the efforts of volunteers and has been responsible for the virtual elimination of heating boiler explosions.

Other services provided to society by non-profit membership corporations are simply too many to enumerate. Not only does AAES utilize the services of more than 600 individual volunteers to staff its more than forty (40) committees, but the constituent societies of AAES employ the services of thousands of volunteers, all expressly limited by the charters of member organizations to educational, scientific or charitable activities. While many pages could be devoted detailing the work of each of AAES' 38 member societies and their volunteers, a brief description of the activities of only a few such societies readily demonstrates not only the services they provide, but the enormous problem created for them by the decision below. For example, the American Institute of Mining, Metallurgical and Petroleum Engineers, Inc. ("AIME") not only produces five monthly, one bi-monthly and one annual publication, but also utilizes volunteers to identify and disseminate information concerning significant developments in the area of mining, metallurgical and petroleum technology. Similarly, the American Society for Metals ("ASM") also works

through volunteers and actively disseminates information concerning advances in the engineering, design, processing and fabricating of metals and like materials to the general public as well as the profession. Finally, the American Society of Civil Engineers ("ASCE") was, prior to the decision of the Circuit Court, planning to embark on a codes and standards program dealing with the various components of civil engineering. Obviously, the spector of treble damage antitrust liability may deter not only the full implementation of the ASCE standards and codes program, but may also cause the other societies to cut back on their activities since it is virtually impossible for the permanent staffs of the societies to, in effect, guarantee that none of their volunteers are not reporting what appears to be an advance in the state of the art, but which is really nothing more than a well-camouflaged endorsement for a procedure or process utilized by a particular private concern.

In addition to the activities of AAES and its member societies, contributions of non-profit membership corporations also include the efforts of bar associations, medical associations, accountants organizations and community planning boards, to name just a few which have historically mobilized billions of dollars of manpower and talent for the benefit of the general public. These many associations have played important roles in improving public safety and product reliability, maintaining high ethical and professional standards for the various professions and providing for the dissemination of information necessary to the increasing quality of our lives.

If AAES, its member societies and other non-profit membership corporations are forced to choose between exposing themselves to the devastating consequences of treble damage antitrust liability or cutting back on the

utilization of volunteers, with the concommitant dimunition of services rendered to the public, the choice is clear—services will have to be cut back. The consequences to American society of such a decision are profound indeed. We have historically opted to have voluntary non-profit professional associations monitor the standards of admission to the practice of many of our professions. Do we now wish to turn back those responsibilities to government? In an age of increasing reliance on engineering and technology, do we wish to have the government undertake the herculean and costly responsibility for promulgating and interpreting codes and standards? Clearly, society has in the past been well served by allowing the private sector to discharge these responsibilities—all through the acts of volunteers.

This is not to say that non-profit organizations should be immune from suit. Quite the contrary. Each of these organizations do have responsibilities to monitor reasonably the activities of their volunteers. Nevertheless, it is simply unrealistic to expect these organizations to detect every possible disloyal volunteer before he acts. What is necessary is a balancing of priorities. Indeed, this Court has previously articulated a perfectly workable rule which recognizes the need to foster volunteerism on the one hand while holding such organizations properly accountable for acts of their volunteers taken to advance the interests of the organization. Thus, in the second *Coronado Coal* case, this Court refused to hold a union liable for acts encouraged by its president and held that:

> "In our previous opinion we held that a trade-union, organized as effectively as this United Mine Workers' organization was, might be held liable, and all its funds raised for the purpose of strikes might be levied upon to pay damages suffered through illegal methods in carrying them off; *but certainly,*

> *it must be clearly shown in order to impose such a liability on an association of 450,000 men that what was done was done by their agents in accordance with their fundamental agreement of association.*" *Coronado Coal* v. *United Mine Workers of America*, 268 U.S. 295, 304 (1925) (emphasis added).

This principle applied to a labor union, that a large organization may only be held responsible for acts taken to benefit the organization should be applied to non-profit membership corporations. As in the case of labor unions, non-profit membership corporations serve important public functions which must be recognized by our courts. By applying the test of "apparent authority" to the instant case, the lower court has, in our view, unwisely failed to recognize the need to balance these competing interests.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court should be reversed.

Respectfully submitted,

MICHAEL D. BROWN
1370 Avenue of the Americas
New York, New York 10019
(212) 489-0220

Attorney for The American Association of Engineering Societies, Inc.

Of Counsel:
HOWARD B. PRESANT
1370 Avenue of the Americas
New York, New York 10019
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